

Your Ref:

Our Ref: Succession Law Committee: 21000348/49

30 May 2012

The Honourable Jarrod Bleijie MP
Attorney-General, Minister for Justice
GPO Box 149
BRISBANE QLD 4001

By email: [REDACTED]

Dear Attorney

QCAT AND JUSTICE OF THE PEACE

We understand, at the recent Justice of the Peace (JP) Association conference, you announced a proposal to have Justices of the Peace sit and determine low level Queensland Civil and Administrative Tribunal (QCAT) matters through a JP Magistrates Court system. We understand that this would involve “up-skilling” JPs(qualified) to JPs(Magistrate) and that low level QCAT matters would be transferred to a JP Magistrates Court. We understand the objective of this proposal is assist QCAT to quickly process complex matters.

The Society has concerns with this proposal.

Legal Representation

Presently the Society has found that the determination of “complex matters” and the denial of legal representation has frustrated QCAT hearings. The decisions in the *Lida Build* cases are a good example of the difficulties encountered, where:

- the initial application for legal representation was refused, and the Tribunal stated:

“the tribunal has been unable to ascertain any such complex question that would necessitate input from a legal representative”¹;

- on appeal the application for legal representation was refused, and the Tribunal stated:

It follows that nothing in the submissions delivered for Lida Build is persuasive that the learned member was wrong to conclude that the questions which might come before this Tribunal for adjudication ‘...necessitate input from a legal representative’. Subsequent submissions have the unfortunate effect of raising the spectre of the converse – that, in fact, the presence of lawyers

¹ *Lida Build Pty Ltd v Miller* [2010] QCAT 155 at [8].

may carry a risk of adding needless complexity, and much greater delay and cost, to what is essentially a simple dispute about the construction of a swimming pool and its surrounds.²

- the substantive decision³ was then appealed by both parties and significant aspects of the matter were “returned to the Tribunal for reconsideration according to law.” The Appeal Tribunal stated:⁴

In the circumstances it is apparent that the Tribunal has, with respect, made an error of law in determining the extension issue, and the calculation of delay costs and liquidated damages, and also failed to expose a rational explanation for its decision....

In the circumstances these issues must go back to the Tribunal for reconsideration and determination according to law. I would allow both appeals on this issue and make orders referring the issues back to the Tribunal.

Before a matter is “transferred” there may be significant debate as to whether the matter is “complex.” Further if two Justices of the Peace were to sit and determine what is effectively a low level QCAT matter, they may be less inclined to allow legal representation for parties seeking an advocate and depending on their skill set, experience and “up-skill” training, may be more inclined to make errors of law or fact. Is this an acceptable community outcome simply because a matter is classified as “low level?” This would be to the disadvantage of parties.

Determination of low level matters

Many questions also arise as to who will be determining what is a “low level” matter. Would a new procedure be put into place for matters to be determined by QCAT Senior Members on the papers? Would parties have an active role? Would there be a monetary limit for low level matters? Will there be a provision for the JP Magistrates to refer matters back to QCAT in circumstances where the JPs consider it not to be low level?

Again, the Society submits that the determination of low level matters can be problematic and will likely increase the time to hear matters.

“Up-skilling” participants

The effect of your proposal, as we understand it, is to vest JP(qualified) with the same exercise of court powers as that of a JP(Magistrate) with up-skilling training. However it is only persons who hold office as a Supreme, District or Magistrate Courts judge, resigned or retired from said office, a registrar or clerk of the court, or a legal practitioner who are recognised under s19, *Justices of the Peace and Commissioners for Declarations Act 1991* (QLD) to be a JP(Magistrate.) The Society considers that no amount of “up-skilling training” could replicate or replace a formal law degree or the experience gained as a result of being an officer of the Court.

² *Lida Build Pty Ltd v Miller* [2010] QCATA 17 at [13].

³ *Lida Build Pty Ltd v Miller* (No 2) [2010] QCAT 431.

⁴ *Lida Build Pty Ltd v Miller and Anor* [2011] QCATA 219 at [53] – [54].

The Society raised issues and concerns in its letter of submissions of 31 October 2011 to the former Health Minister regarding a review of Queensland's Justice of the Peace Framework, including eligibility criteria and training/mentoring issues. Our letter is **attached** for your consideration.

The Society proposes that in lieu of up-skilling Justices of the Peace to constitute a JP Magistrates Court, QCAT would be better placed to call for more retired (or retiring) legal practitioners, judges and experts in other fields to constitute QCAT for that purpose.

In any event, practical criteria and guidelines should be in place for any selection process.

QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland"

We also refer to the Report prepared by the Queensland Law Reform Commission (the QLRC Report) in 1999 on "the Role of Justices of the Peace in Queensland." Recommendation 10.2 on page (v) is of particular relevance:

*Justices of the peace (qualified) should not have the power to constitute a court for any purpose.*⁵

We agree with this recommendation. We also refer to the QLRC's Discussion Paper⁶ where the QLRC observed:

- *"that justices of the peace (qualified) had not constituted a Magistrates Court for any purpose at any of the Magistrates Courts surveyed by the Commission during March and April 1998..."; and*
- *"although it (the QLRC) had received 75 submissions from justices of the peace (qualified) in response to the (QLRC) Issues Paper, none of those respondents indicated that they had ever performed any bench duties."*⁷

The QLRC Report then restated the Commission's view that:

"...it is undesirable for powers that are not exercised by justices of the peace to remain vested in them, since the infrequent exercise of those powers would make it less likely that justices of the peace would develop the necessary experience and expertise to exercise them. The Commission considered that, in relation to court powers, this could lead to a lack of consistency in the decisions made by justices of the peace when constituting a court."¹⁰¹⁷

Further, the Commission was of the opinion that, if large numbers of justices of the peace were, at least theoretically, authorised to exercise a range of court powers, it would be virtually impossible to keep all of them up to date with the frequent changes in the relevant law and procedure. The Commission considered it more effective for the exercise of court powers to be restricted to a relatively small group of more intensively trained justices of the peace."¹⁰¹⁸

⁵ QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland", page v
<http://www qlrc.qld.gov.au/reports/r54.pdf>

⁶ The Role of Justices of the Peace in Queensland (WP 54, May 1999).

⁷ QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland", p193 -
<http://www qlrc.qld.gov.au/reports/r54.pdf>

For these reasons, the Commission's preliminary view was that the exercise of court powers should be restricted to justices of the peace (Magistrates Court). Justices of the peace (qualified) and old system justices of the peace should not be able to exercise these powers.”⁸

In summary, the Society supports the QLRC's Report⁹ and strongly urges for it to be taken into account before implementing any procedural changes to QCAT, the JP Magistrates Court (civil matters) and effectively what is the exercise of powers of JPs (qualified).

Consultation with you

To that end, we would be pleased to meet with you at a mutually convenient time to discuss these issues further. Please contact our Policy Solicitor, Ms Louise Pennisi on [REDACTED] to arrange a meeting.

Yours faithfully

[REDACTED]

Dr John de Groot
President

⁸ QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland", p192 - <http://www qlrc.qld.gov.au/reports/r54.pdf>

⁹ QLRC Report No.54 (1999) "The Role of Justices of the Peace in Queensland."